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THE ARMY LAWYER



DA PAMPHLET 27-50-41 HEADQUARTERS, DEPARTMENT OF THE ARMY, WASHINGTON, D.C.

Personnel Policy Changes

The following letter is from The Judge Advocate General.

DEPARTMENT OF THE ARMY
OFFICE OF
THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C. 20310

15 MAR 1976

DAJA-PT

SUBJECT: Personnel Policy Changes

ALL STAFF JUDGE ADVOCATES

1. There have been several inquiries from the field concerning some of the new personnel policies that I have implemented over the past several months.

2. As you may recall from last year's JAG Conference, we have overstrength year groups from 1968-1973. The ideal force is about 55 career officers in each year group. Some year groups are almost twice that. The overstrength year groups are the ones now eligible for the Advanced Class. Contrary to past experience, there are roughly twice as many officers who volunteer to go to the career course as there is room, notwithstanding the fact that we expanded the size of the class from 35 to 50. When this problem was discussed, PP&TO, the Executive, and the general officers, decided that the fairest way to pick officers under these circumstances would be by a board of senior officers.

3. The board considered 202 judge advocate officers. They selected 50, and some alternates. The results of any board, where there is real competition for selection, are always subject to differing opinion. There will always be some who think that better choices could have been made. I do not see any evidence that there was discrimination against officers who had served with line

units. I believe that had the board been composed of a different group of senior judge advocates, the results would not have varied in any great degree. The board, insofar as I can determine, did the best job possible in selecting the best qualified. The board did report that they had great difficulty in making their selections. This speaks well of the quality of our junior judge advocates. Unfortunately, it also means that some officers with good records will not be able to attend the resident course under present circumstances.

4. I assure you that these matters are being given careful consideration. I cannot "sugar-coat" a difficult situation, nor can I guarantee anyone in the Corps, including the company grade officers, that their future is assured. We are part of the Army and the Army is undergoing very severe turbulence in the area of personnel and personnel policies. We must expect that this turbulence will filter down to us in some degree. Fortunately, we have been spared, thus far, the quantitative and qualitative RIFs that the rest of the Army has had to undergo. We are not in worse shape than the rest of the Army, nor do we have a tougher "up or out" policy than before. In point of fact we have been guaranteed by the Secretary of the Army, in our separate promotion list, that we will have selection rates no lower than we've had for the last five years. What is more difficult, and what everyone must recognize, is that for a period of some years there are going to be fewer openings in the career force than there are people who want to stay in. Some officers, with good records, will be denied a career status. Moreover, as long as the year group overstrengths exist there will be some who will be denied attendance at the Advanced Class. They

The Army Lawyer

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will have to obtain it by correspondence. There has been considerable thought given to a more liberal policy of constructive credit. However, I rejected that because the alternative of obtaining it by correspondence is feasible for almost all our officers. I have also asked the JAG School to consider looking into the nonresident course in order to ensure that it meets our new conditions.

5. I hope this information will be helpful in understanding the impact of recent developments on our personnel situation.

6. Attached for your information is a letter to a Staff Judge Advocate concerning related matters.

1 Incl
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WILTON B. PERSONS, JR.
 Major General, USA
 The Judge Advocate General

DEPARTMENT OF THE ARMY
 OFFICE OF
 THE JUDGE ADVOCATE GENERAL
 WASHINGTON, D.C. 20310

DAJA-PT

Thank you for your letter of 24 February 1976.

I am aware of the concern that many of our judge advocates have expressed about the new personnel policies I have found necessary to implement during the past several months. In my trips to the field these personnel matters have always been a prime source for discussion. I wish there were an easy solution. There is not. Nor can these problems be "wished" away. There is a problem, it is complex, and it must be faced squarely. For several years officers were brought into the Judge Advocate General's Corps via the Excess Leave Program and direct commissions as career officers without too much concern for the future strength or composition of the Corps. This worked for a time because of the extremely high rate of attrition. When the retention of Excess Leave officers went up, as did the retention rate of direct commission officers, this left us with several year groups that were sub-

stantially overstrength. Incidentally, JAG was not alone in miscalculating the rates of career officer retention. DCSPER, with all its sophisticated computers and experts, finds itself with the same dilemma, regarding the OPD officers, in these identical year groups. As I'm sure you're aware, but many junior officers are not, the pyramidal promotion system of the Army requires a very close monitoring of year group populations. Otherwise, promotion humps are created that can inhibit promotions for years. In your years of service, you've seen this happen. It is necessary that there be a distribution of career officer strength so that rank and experience are reasonably spread out. Moreover, there must be a mix of career officers and noncareer officers at the base to accommodate the narrowing apex of the pyramid. With our separate promotion list this becomes even more important. The alternative is promotion stagnation or extremely low rates of promotion. That, in short, is the reason that tight controls had to be instituted over career officer accessions in the year groups that were overstrength.

These overstrengths have affected other personnel policies, including selection for the Advanced Class. Because of the great number of career officers in year groups '68-'73, there are many more officers who want to attend than there is space to accommodate them. Moreover, the old system of selecting the Advanced Class, from only volunteers, did not always insure that the best qualified officers were attending. In my view it became necessary to reexamine the policies and procedures for selecting members of the Advanced Class to insure that the best quality were selected and also to insure, under circumstances where not all could attend, that the selections were made in as fair a way as possible.

The decisions I made concerning the Regular Army and the Advanced Class selections were carefully considered after discussion of alternatives with PP&TO, the Executive, and the other general officers. No system is perfect. I agree with you that OER's do not always adequately reflect a true picture of an officer. However, you are mistaken if you think that OER's were the sole criteria for selection. The board considered the officer's entire record, including letters of

recommendation from staff judge advocates and others. Of course, the OER's were very important, but in all candor, I don't see how it could be otherwise. Presumably, staff judge advocates, and other raters and indorsers, know that these Officer Efficiency Reports will be used for board purposes. While the reports are inflated, the same is true of SJA letters of recommendation. These inflated reports, and inflated recommendations, did make it difficult for the boards to perform their missions. This is true of every Army selection board that meets, not only in our branch, but throughout the Army. I know of no fairer way to make the selections than by a board considering an officer's file. Your suggestion that there be an order of merit list by SJA's does not seem workable. That would only give a comparison within a small group. Moreover, an SJA might legitimately believe that someone he was forced to rate, say 16 of 20, was better than others in offices where, in the SJA's opinion, there were officers of lesser quality. The officers who served on these boards were some of our best officers. They worked hard and were well aware of the seriousness of their mission. I'm certain that another board, composed of a different group of senior officers, would have made substantially the same decisions. I regret that some fine young officers, like ***** have been caught in this dilemma. We are now undergoing the travail that the rest of the Army officer corps has been going through for the past several years. We must accept the realities of the situation, attempt to limit the existing problems, and, most importantly, make decisions that will not exacerbate the situation.

I thank you for your letter. I assure you that all the matters you have referred to have been given close study. I am sorry that there is a misunderstanding by some officers of the nature and scope of the problem. I have been attempting to do all I can do to get the message out concerning this problem. I have asked all of the other general officers, on their trips, to do this as well. I have charged Lieutenant Colonel Ron Holdaway with the task of explaining the problem to the Corps as a whole. It is difficult to adjust our thinking to the different situation that exists now from the one that existed three or four years ago. It is

necessary to do so, however. There is a problem. We here at OTJAG recognize it. Within the limits of what is possible, we are attempting to do our best for both our officers and the Corps.

Sincerely,
WILTON B. PERSONS, JR.
Major General, USA
The Judge Advocate General

Professional Responsibility

FROM: Criminal Law Division, OTJAG

Ethics. The Criminal Law Division recently reviewed an allegation of unethical conduct on the part of an officer in the Judge Advocate General's Corps. In his capacity as defense counsel for four robbery suspects, this attorney began to look into the possibility of resolving the victim's civil claim for assault by means of a cash settlement. Upon discovering that such a settlement was possible, he obtained the necessary funds from his clients to pay it and arranged to meet the victim at the legal office in order to complete the transaction. Prior to the meeting he decided that he would also attempt to secure an admission from the victim that no robbery had occurred. There was some basis to believe that no property was taken from the victim. At the meeting, the victim stated that he had not been robbed but had only alleged robbery because of his anger at the accused. The attorney placed the money for the civil settlement on the table and asked the victim to sign the civil release and the statement of retraction. Before the victim signed the retraction statement, he was removed by police officials who had learned from the attorney what was transpiring.

While it was determined that no criminal acts were committed or intended on the part of the attorney, he placed himself in the position where his actions could be misunderstood. Because the victim retracted the robbery allegation before the attorney offered restitution for the civil release, there was no violation of Disciplinary Rule 7-109, Code of Professional Responsibility, which proscribes paying a witness contingent on the content of his testimony.

The ethics question in this case was one of the factors leading to a revival of the OTJAG Professional Ethics Committee. This Committee was originally established by a Special Order on 21 March 1975 to provide counsel and advice to The

Judge Advocate General on matters involving professional responsibility and conduct of Judge Advocates and civilian attorneys; to consider questions and issues concerning professional responsibility and conduct properly referred to it; and to make findings and recommendations to The Judge Advocate General.

Two cases recently reviewed by the Ethics Committee are summarized here for their interest to judge advocates.

In the first case, the ethical issue presented centered around pretrial communications between the trial counsel and the accused through a third party, the accused's battery commander. During routine health and welfare visits to the accused in pretrial confinement, the battery commander discussed with the accused facets of his case. On one occasion, the battery commander called the trial counsel to relate a defense which the accused had discussed with him. On a subsequent visit to the accused he communicated the trial counsel's comment that such a "story would probably just get you into more trouble." After objection from the defense counsel concerning such discussions, trial counsel cautioned the commander to desist from discussing the case with the accused.

In considering the trial counsel's conduct, the Ethics Committee evaluated it against ABA Code of Professional Responsibility, Disciplinary Rule 7-104(A) (1), "Communicating With One of Adverse Interests." That Disciplinary Rule provides that:

(A) during the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the

lawyer representing such other party or is authorized by the law to do so.

In reaching its conclusion that there had been no ethics violation in this case, the Committee noted that the applicable rule contemplates violations based on affirmative action by an attorney. In this instance there had been no showing that the trial counsel took any affirmative action to "cause another to communicate" with the accused concerning matters related to the case. Rather, the trial counsel's conduct was characterized by a lack of action to prevent such communications. Under these circumstances, although the trial counsel exercised poor judgment in discussing conversations between the commander and the accused with the commander, he did not violate the language of the Disciplinary Rule.

In the second case decided by the Committee, the trial defense counsel had submitted the accused's request for trial by judge alone although he was aware at the time that the judge had tried a companion case in which witnesses had mentioned the accused as a co-actor. Prior to approving the request, the military judge disclosed his involvement in the other case. The accused reiterated his desire to be tried by that judge and the defense counsel remained silent. In this case proper trial procedure was not followed and the request for judge alone was granted before trial counsel had made an inquiry into possible challenges for cause against the military judge. When the appropriate inquiry was made, the defense counsel then challenged the judge based on his participation in the other case. The challenge was denied.

In considering the defense counsel's conduct,

the Committee evaluated defense counsel conduct against Disciplinary Rule 1-102(A) (4) and/or (5). Disciplinary Rule 1-102(A) (4) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Subsection (5) proscribes conduct "prejudicial to the administration of justice."

The Committee found that defense counsel did not violate Disciplinary Rule 1-102 by permitting his client to request trial by a military judge that he subsequently intended to challenge for cause. In view of the procedures being used, i.e. determining whether the accused desired trial by judge alone before making any inquiry as to challenges, counsel was merely responding to the situation in which he found himself. He apparently saw no reasonable alternative in his desire to protect the interest of his client who desired trial by military judge alone, even though counsel did not desire the detailed judge to be the sitting judge. The defense counsel should have notified the military judge of his challenge when the judge disclosed his participation in the prior case. However, the Committee concluded that the defense counsel's failure to so notify the judge resulted from inexperience and poor judgment rather than unethical behavior.

Although no ethical violation was found in any of the three cases, in each instance the counsel put himself in a compromising situation. The common reason was insensitivity to the ethical implications of their conduct. The Code of Professional Responsibility should be read and read again by every counsel, so that an inner alarm warns one whenever he even approaches a possible violation.

JUDICIARY NOTES

From: U.S. Army Judiciary

RECURRING ERRORS AND IRREGULARITIES

1. *Applications for Relief.* Often, the processing of an application for relief from conviction by court-martial under the provisions of Article 69, UCMJ, is delayed because the original record of trial does not accompany the application. Whenever possible, the application should be

submitted through the office of the staff judge advocate who was responsible for completion of the review pursuant to Article 65(c), UCMJ. That staff judge advocate should then forward the application, together with the original record of trial and its allied papers, with appropriate comments and pertinent documents (such as certificates or affidavits) concerning the allegations

set forth in the application. The documents should be sent to HQDA (JAAJ-ED), Nassif Building, Falls Church, VA 22041, by certified mail.

2. March 1976 Corrections by A.C.M.R. of Ini-

tial Promulgating Orders:

- a. Failing to set forth the proper words or figures in the specifications of a charge—4 cases.
- b. Failing to indicate that trial was by military judge alone—3 cases.

IMPROPER TRIAL COUNSEL ARGUMENT

By: Captain Leslie Wm. Adams, Defense Appellate Division, U.S. Army Legal Services Agency, Falls Church, Virginia

Of those functions a defense counsel undertakes in the representation of his client, none is so basic as the duty to assure the accused a fair trial; a proceeding as free from irregularity as possible. In the area of monitoring trial counsel argument, the importance of defense counsel action in the face of improper prosecutorial comment was recently reemphasized in *United States v. Nelson*.¹ The Court of Military Appeals there considered three distinct forms of questionable final argument: reference to the appellant's failure to raise his trial defense theory at the Article 32 investigation, use of inflammatory comments and interjecting inadmissible hearsay to bolster his case. The first problem was held not to constitute an impermissible comment on the accused's right to avoid self-incrimination; the last was grounds for reversal where the military judge erred in overruling defense counsel's timely objection. Trial counsel's comparison of the credibility of a defense witness to Hitler's lying tactics was found to be inflammatory, not based on the record, a statement of personal opinion and "patently erroneous". However, the Court, per Chief Judge Fletcher, found the absence of defense objections to be an indication that the comment had little impact (mitigating the military judge's "perplexing" inaction) and invoked the doctrine of waiver.

The lesson of *Nelson* should not be lost: it is essential to object to improper argument immediately upon its occurrence. An objection must be entered to each form of improper argument as it occurs. To be effective, each objection should identify the offensive comment, at sidebar if appropriate, state the grounds on which it was improper and state the relief defense counsel

deems necessary to correct it.² Deciding what is objectionable requires that counsel be familiar with the case law summarized below, and that defense counsel be attuned to any matter which works to his client's prejudice. Furthermore, *Nelson* indicates³ that all counsel should be intimately familiar with the *Code of Professional Responsibility* and the *ABA Standards Relating to the Prosecution Function and the Defense Function*.⁴ The latter will indicate basic objectionable argument,⁵ including that which calls for disciplinary sanctions.⁶

Adherence to the *Standards Relating to the Prosecution Function* would avoid the problem altogether. As indicated above,⁷ trial counsel risks censure if his argument strays beyond fair bounds. The function of the prosecutor was set down by Mr. Justice Sutherland long ago and bears repeating:⁸

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Ethics and legality aside, the trial counsel who organizes and presents his facts fully and effectively needlessly jeopardizes his case with ill-considered final argument.

The trial judiciary must be alert to possible abuses. "The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial." ⁹ The *ABA Standards Relating to The Function of the Trial Judge* repeat the basic prohibitions on the closing argument of counsel "to emphasize the trial judge's obligation to enforce these prohibitions against improper argument which carries a high potentiality for prejudice to the interests of justice." ¹⁰ Attention to this matter will have the additional salutary effect of reducing the Court of Military Appeal's perplexity in such matters to a minimum. ¹¹ That Court cited the Supreme Court opinion in *Donnelly v. DeCristoforo* ¹² as the correct approach to curing the error. The instruction given in *DeCristoforo* contained the following elements: ¹³

1. It was emphasized that closing arguments are not evidence.
2. The objectionable remark was repeated.
3. The remark was declared to be unsupported by evidence.
4. The jury was instructed to disregard the statement and consider the case as if it had not been made.

The Court cautioned, however, that some trial occurrences may be too clearly prejudicial to be mitigated by a curative instruction. ¹⁴

The following summary of principle cases is arranged in three categories that will aid in conceptualizing the errors. *Improper* argument contains basic faults such as misstating the evidence or arguing personal beliefs. *Inflammatory* argument may exaggerate a basic fault or appeal to passion and prejudice. "Illegal" argument enters some area in which comment is prohibited. These categories are not mutually exclusive; an improper argument may find itself in all three as its severity escalates.

Improper Argument

1. It is improper to misstate evidence, argue facts not supported by evidence or not admitted in evidence.

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record. . . . *ABA Standards, The Prosecution Function*, §5.9. See also: paragraph 72b, *Manual for Courts-Martial, United States*, 1969 (Revised edition); Disciplinary Rule 7-106(C) (1), *ABA Code of Professional Responsibility*.

United States v. Nelson, 24 U.S.C.M.A. 49, 51 C.M.R. 143, 76-1 JALS 3 (1975); use of inadmissible hearsay to corroborate identity of accused.

United States v. Garza, 20 U.S.C.M.A. 536, 43 C.M.R. 376 (1971); reference to document not admitted in evidence.

United States v. Gerlach, 16 U.S.C.M.A. 383, 37 C.M.R. 3 (1966); trial counsel's argument contradicted stipulation.

United States v. Johnson, 12 U.S.C.M.A. 602, 31 C.M.R. 188 (1962); improper rebuttal of defense sentence argument with matters not in evidence: lack of promotions, failing tests.

2. It is improper to refer to witnesses not present who could or should have been called.

United States v. Tawes, 49 C.M.R. 590 (A.C.M.R. 1974); statement that Government could obtain everyone else present to testify to same facts improper and unprofessional.

United States v. Eggleton, 48 C.M.R. 502 (A.F.C.M.R. 1974); trial counsel comment that defense failed to call accomplice as corroborating witness clearly improper.

3. Neither counsel may cite legal authorities or the facts of other cases, except when arguing before the military judge sitting alone. Paragraph 72b, MCM, *supra*.

United States v. McCauley, 9 U.S.C.M.A. 65, 25 C.M.R. 327 (1958); case defining ele-

ment of charge given to members.

United States v. King, 12 U.S.C.M.A. 71, 30 C.M.R. 71 (1960); facts of cases with severe sentences argued in aggravation of sentence: held to be miscarriage of justice despite waiver.

United States v. Adams, 5 U.S.C.M.A. 563, 18 C.M.R. 187 (1955); laws misstated over defense objection.

4. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. *ABA Standards, The Prosecution Function*, §5.8(b). See also Disciplinary Rule 7-106(C) (4), *ABA Code of Professional Responsibility*.

United States v. Nelson, supra; "That is the most preposterous story I've ever heard."

United States v. Long, 17 U.S.C.M.A. 323, 38 C.M.R. 121 (1967); trial counsel opined that defendant was unworthy of belief.

5. Trial counsel may not refer to any punishment or quantum of punishment in excess of that which can lawfully be imposed in the particular case by the particular court. Paragraph 75f, MCM, *supra*.

United States v. Davis, 47 C.M.R. 50 (A.C.M.R. 1973); trial counsel compared military maximum sentence of ten years confinement to other jurisdictions where life imprisonment or death could be imposed.

Cf. United States v. Jones, 10 U.S.C.M.A. 532, 28 C.M.R. 98 (1959); on rehearing, court told of original sentence absent reassessment by convening authority; court must know maximum impossible and not basis for limitation.

6. It is improper to use a legitimate pretrial administrative tool for an illegitimate purpose.

United States v. Pinkney, 22 U.S.C.M.A. 595, 48 C.M.R. 219 (1974); accused's application for a Chapter 10 discharge argued to indicate a desire for separation.

7. It is improper to argue that a sentence should be considered in light of probable clemency action by higher authorities.

United States v. Carpenter, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960); improper to argue that the convening authority considered clemency matters before referring the case.

United States v. Simpson, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959); highly improper to inform panel that any bad conduct discharge would probably be removed by the A.B.C.M.R.

Inflammatory Argument

1. The prosecutor should not use argument calculated to inflame the passions or prejudices of the jury. *ABA Standards, The Prosecution Function*, §5.8(c); *United States v. Long, supra*.

2. Appeals to national, patriotic, local, racial or religious prejudices are improper.

United States v. Garza, supra; prosecutor ran "political trial" implying accused's family followed heinous political philosophy inimical to the United States.

United States v. Boberg, 17 U.S.C.M.A. 401, 38 C.M.R. 199 (1968); murder of a Vietnamese civilian compared to a killing by the Viet Cong.

United States v. Prendergrass, 17 U.S.C.M.A. 391, 38 C.M.R. 189 (1968); accused was called a cowardly example of shameless behavior, protecting his own life while his comrades go to battle and die—clearly inflammatory in absence of any supporting evidence.

United States v. Priest, 46 C.M.R. 368 (N.C.M.R. 1971); promoting disloyalty compared to three assassinations and civil strife in the United States.

3. References to jurors and their families.

United States v. Wood, 18 U.S.C.M.A. 291, 40 C.M.R. 3 (1969); argument invited panel members to imagine child victims of sex assaults as their own sons and daughters—patent attempt to destroy impartiality.

United States v. Wood, supra; trial counsel threatened panel with contempt by their peers and ostracism if they did not disapprove accused's actions by eliminating him.

United States v. Boberg, supra; members were asked whether life sentence would not be appropriate if a brother had been the murder victim.

United States v. Shamberger, No. 30,638 (U.S.C.M.A. 2 April 1976) Trial counsel invited members to put themselves in the place of the rape victim's husband.

4. Trial counsel may not comment upon the probable effect of the court's findings on relations between the military and civilian communities. Paragraph 72b, MCM, *supra*. See ABA Standards, *The Prosecution Function*, §5.8(d).

United States v. Boberg, supra; counsel argued that murder of a Viet Nameese civilian embarrassed the United States and utterly compromised its mission.

United States v. Cook, 11 U.S.C.M.A. 99, 28 C.M.R. 323 (1959); argument asserted the impact of the murder of a Phillipine national on military—civilian relations.

5. It is improper to associate the accused with other offensive conduct or persons without justification.

United States v. Nelson, supra; defense witness placed in an offensive historical perspective by comparison to Hitler.

United States v. Long, supra; accused's attitude declared to be that the military could go to hell—prison was preferable to Vietnam.

Illegal Argument

- 1. Trial counsel may not comment upon the failure of the accused to take the witness stand or the exercise by the accused of his rights under Article 31. Paragraph 72b, MCT.

United States v. Saint John, 23 U.S.C.M.A. 20, 48 C.M.R. 312 (1974); trial counsel may not comment in manner to suggest that defendant's silence may be considered against him, but statement that prosecution witnesses were unchallenged and unrebutted not improper where defense counsel failed to object and argued that defense witnesses were unimpeached.

60. *United States v. Skees*, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959); argument that it was for the defendant to say why he could not comply with an order, as suggested by a witness, was an improper comment on accused's failure to testify.

United States v. Stegar, 16 U.S.C.M.A. 569, 37 C.M.R. 189 (1967); cross-examination and argument that indicated the accused refused to say anything when first interviewed was prohibited conduct repeatedly condemned by U.S.C.M.A.

Cf. United States v. Tackett, 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966); error to indicate accused refused to make a pretrial statement until allowed to consult counsel.

United States v. Russell, 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964); argument that appellant, if completely innocent, would have submitted to a blood test before trial to remove self from suspicion was disregard of accused's right against self-incrimination.

2. It is error to comment on a withdrawn plea of guilty.

Cf. United States v. Daniels, 11 U.S.C.M.A. 22, 28 C.M.R. 276 (1959); error to impeach with stipulation given pursuant to guilty plea entered at trial since returned for rehearing. See *United States v. Stivers*, 12 U.S.C.M.A. 315 at 318, 30 C.M.R. 315 at 318 (1961).

- 60.3. General prejudice occurs when command influence is introduced into a trial.

United States v. Allen, 20 U.S.C.M.A. 317, 43 C.M.R. 157 (1971); attempt to read Secretary of the Navy policy on elimination of drug abusers required reversal because no cautionary instruction directing that a commander's policy be ignored can cure prejudice.

United States v. Lackey, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958); reversal required where trial counsel argued that people who brought and referred charges wanted accused eliminated.

4. It is plain error to equate credibility with rank.

United States v. Ryan, 21 U.S.C.M.A. 9, 44 C.M.R. 63 (1971); trial counsel called defense witnesses liars and "elevated to a legal axiom [the inference] that the degree of rank carries a corresponding degree of credibility"; argument was plain error.

This case summary does not represent a complete survey of military case law but adequately illustrates the categories of improper comment. An understanding of how the above examples fit the framework of improper, inflammatory or illegal subjects eases identification, avoidance and correction of objectionable argument. It is more important to comprehend how a statement may be objectionable than it is to memorize what has been held to be error. Indeed, the Court of Military Appeals has held that lack of precedent will not excuse a failure to object.¹⁵ Furthermore, that Court's observation that failure to object may demonstrate a concern that to do so would reflect unfavorably upon the defense¹⁶ is tempered by frequent reference to that failure as an indication of the comment's minimal impact.¹⁷

Clearly, avoidance of improper subject matter is the ethical responsibility of all counsel. However, the Supreme Court has noted that:

in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation.¹⁸

To that end, defense counsel must be familiar with the bounds of proper comment, be alert to remarks that unfairly prejudice his case, and be ready to object effectively.

Footnotes

1. 24 U.S.C.M.A. 49, 51 C.M.R. 143, 76-1 JALS 3 (1975).
2. Relief may take the form of an appropriately emphatic direction to disregard to the panel, a cautionary warning to trial counsel, a closing instruction repeating that improper counsel argument must be ignored and, ultimately, mistrial.
3. Footnote 2 at 24 U.S.C.M.A. 51, 51 C.M.R. 145.
4. The Code and these Standards are made applicable to counsel in courts-martial by Paragraph 2-32, Army Regulation 27-10.
5. The Prosecution Function, §§ 5.8, 5.9; The Defense Function, § 7.8.
6. The Prosecution Function, § 1.1(e); The Defense Function, § 1.1(f).
7. Note 6, *supra*.
8. *Berger v. United States*, 295 U.S. 78 at 88; *see United States v. Valencia*, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).
9. ABA Standards Relating to The Function of the Trial Judge, § 1.1(a).
10. *Id.*, § 5.5, Commentary, p. 73.
11. *See, United States v. Nelson*, 24 U.S.C.M.A. 49 at 52, 51 C.M.R. 143 at 146.
12. 416 U.S. 637 (1974).
13. *Id.* at 641, 644. *See n. 2, supra*, for other forms of relief.
14. *Id.* at 644.
15. *United States v. Pinkney*, 22 U.S.C.M.A. 595, 48 C.M.R. 219 (1974). "The lack of a case on point does not exempt counsel from evaluating the legal issues in a trial as they develop, according to generalized principles of law." At 598, 222.
16. *United States v. Ryan*, 21 U.S.C.M.A. 9 at 11, 44 C.M.R. 63 at 65 (1971).
17. *See, United States v. Nelson, supra n. 1; United States v. Saint John*, 23 U.S.C.M.A. 20, 48 C.M.R. 312 (1974); *United States v. Ryan, supra n. 16; United States v. Wood*, 18 U.S.C.M.A. 29, 40 C.M.R. 3 (1969).
18. *Dunlop v. United States*, 165 U.S. 486 at 498 (1897).

JAG School Notes

1. Submission Of Articles To The Army Lawyer.

Persons desiring to submit articles to *The Army Lawyer* for possible publication are advised that such articles should be submitted in duplicate, double spaced, to the Editor, *The*

Army Lawyer, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. Footnotes should be double spaced and appear as a separate appendix at the end of the text. Citations should conform to the *Uniform System of Citation* (11th edition 1967) copyrighted by the Columbia, Harvard, and University of

Pennsylvania Law Reviews and the *Yale Law Journal*.

Because of space limitations, it is requested that articles submitted be kept to a maximum of approximately ten double spaced typewritten pages and that footnotes be kept to a minimum.

2. 80th Basic Class Graduates.

The School extends its congratulations to the members of the 80th Basic Class who graduated on 2 April 1976.

3. Back Issues of *The Army Lawyer* and JALS.

The Doctrine & Literature Division of TJAGSA has found a limited supply of certain back issues of *The Army Lawyer* and JALS which are available for distribution. Surplus supplies of *The Army Lawyer* include the following: August, October and November of 1973; all of 1974 except January; February, March, April, May, July, August, September and October of 1975; 1976 issues are available. Surplus supplies of JALS include all 1975 issues and 76-1.

Persons desiring to obtain back copies of these publications should inclose in their request a stamped self-addressed mailing envelope which is large enough to receive the publication without folding. These requests should be addressed to: Doctrine & Literature Division, ATTN: MAJ McBride, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901.

4. General Officers Visit Advanced Class.

The Judge Advocate General's School was honored by the visit on 18 March of The Judge Advocate General of the Navy, Rear Admiral H.B. Robertson, Jr., and by the visit on 22 April of Brigadier General John R. De Barr, Director of the Judge Advocate Division, Headquarters, U.S. Marine Corps, and Staff Judge Advocate to the Commandant of the Marine Corps. Both officers discussed current programs and issues within their respective services.

5. 1st Military Administrative Law Course.

Sixty quotas have been allocated for Reserve and National Guard judge advocate officers to attend the 1st Military Administrative Law Course, to be offered by the Administrative and Civil Law Division at the School from 21 June 1976 through 2 July 1976. During the first week instruction will be given in legal basis of command subjects, including the legal control and management of military installations, nonappropriated funds, environmental law and military assistance to civil authorities. During the second week military and civilian personnel law subjects will be covered, including boards of officers and civilian labor-management relations. This course is designed to fulfill one-half of the requirements of Phase IV of the nonresident/resident Judge Advocate Advanced Course, and covers one-half of the material presented in the USAR School Judge Advocate Officer Advanced Course (BOAC) ADT Phase IV.

CLE News

1. New Audio And Video Tapes.

New audio and video tapes have recently been added to TJAGSA Library. Request for video tapes should be sent to Commandant, The Judge Advocate General's School, U.S. Army, ATTN: Audio Visual Division, Charlottesville, Virginia 22901. Request should include a blank video cassette. Request for audio tapes should be sent to the above address except the ATTENTION line should be DDNRI. Audio cassettes may be sent for reproduction if you desire to retain a copy. Audio tapes are also available on a loan basis.

VIDEO TAPES

TAPE NUMBER	TITLE	RUNNING TIME
JA-619	5TH ANNUAL KENNETH J. HODSON LECTURE, PART I Mr. Robert M. Ervin, Chairman of the ABA Section of Criminal Justice, addresses the topic of contemporary criminal justice problems. He identifies some of these problems and offers possible solutions.	58:00
JA-620	5TH ANNUAL KENNETH J.	

HODSON
LECTURE, PART II
(Continuation of JA-619)

30:00

Speaker: Major Dennis M. Corrigan, Senior Instructor, Administrative and Civil Law Division, TJAGSA.

AUDIO TAPES

Command of Installation Seminar Problems

- | | | |
|----------|--|-------|
| JA-A-204 | STATE CRIMINAL LAW
One of five Command of Installation Seminar Problems, this first tape examines the application of state law, including its conflicts of law, to legal problems in criminal investigations and the conduct of autopsies under AR 40-2.
Speaker: Major Dennis M. Corrigan, Senior Instructor, Administrative and Civil Law Division, TJAGSA. | 13:00 |
| JA-A-205 | TRAFFIC CONTROL
The application of the Assimilative Crimes Act, 18 U.S.C. § 13, to traffic control and law enforcement, and the effect of a bar to re-entry on use of state highways traversing military installations.
Speaker: Major Dennis M. Corrigan, Senior Instructor, Administrative and Civil Law Division, TJAGSA. | 11:15 |
| JA-A-206 | JUVENILE MISCONDUCT
Alternative criminal and administrative actions available to commanders in the area of juvenile misconduct.
Speaker: Major Dennis M. Corrigan, Senior Instructor, Administrative and Civil Law Division, TJAGSA. | 14:30 |
| JA-A-207 | CONTROL OF OBSCENITY
The limitations upon the commander's authority to control introduction of alleged obscene material into a military installation.
Speaker: Major Dennis M. Corrigan, Senior Instructor, Administrative and Civil Law Division, TJAGSA. | 21:00 |
| JA-A-208 | DISSIDENT ACTIVITIES AND THE FIRST AMENDMENT
The limitations on a commander's authority to regulate fundamental constitutional rights of soldiers and civilians on military installations. | 20:30 |

3rd Environmental Law Course

- | | | |
|------------|---|-------|
| JA-A-209-1 | THE STATE OF THE ENVIRONMENT
The history of environmental concern and environmental regulation in the United States.
Speaker: Professor Dennis W. Barnes, University of Virginia. | 80:00 |
| JA-A-209-2 | THE ENVIRONMENTAL CONSIDERATION PROCESS
The National Environmental Policy Act of 1969.
Speaker: Captain Stephan K. Todd, Administrative and Civil Law Division, TJAGSA. | 75:00 |
| JA-A-209-3 | THE CLEAN AIR ACT AND THE FEDERAL WATER POLLUTION CONTROL ACT
The authority of federal regulations of pollution and the Environmental Protection Agency. Air and water pollution abatement are examined in detail.
Speaker: Captain Thomas M. Strassburg, Administrative and Civil Law Division, TJAGSA. | 90:00 |
| JA-A-209-4 | ENVIRONMENTAL IMPACT STATEMENTS
Preparation of environmental impact statements, their retroactivity, extraterritorial application, and exclusions. Also, the scope of judicial review and the substantive merits of proposed action.
Speaker: Captain Stephan K. Todd, Administrative and Civil Law Division, TJAGSA. | 96:00 |
| JA-A-209-5 | THE EFFECT OF POLLUTION ABATEMENT LAWS ON FEDERAL FACILITIES
Statutory provisions, the implementation of statutory requirements, the judicial review of executive implementation, and the procedural requirements of pollution abatement laws.
Speaker: Captain Thomas M. Strassburg, Administrative and Civil Law Division, TJAGSA. | 85:00 |

JA-A-209-6 INTERACTION OF FEDERAL PROCUREMENT AND ENVIRONMENTAL REGULATIONS 50:00

Public policy through government procurement. An examination of the legal framework of the environmental policy, current contract requirements, contract administration, and the government contractor.

Speaker: Captain King K. Culp, Procurement Law Division, TJAGSA.

JA-A-209-7 MOTOR VEHICLE EMISSIONS, NOISE, AND OTHER ENVIRONMENTAL HAZARDS 48:00

The Clean Air Act, the Noise Control Act of 1972, and the Federal Insecticide, Fungicide, and Rodenticide Act. Federal activities resulting from these acts and problems of current interest.

Speaker: Captain Michael P. McGory, Regulatory Law Office, Office of The Judge Advocate General of the Army.

JA-A-209-8 SOCIO-ECONOMIC CONSIDERATION IN THE IMPACT ANALYSIS PROCESS 101:00

The application of NEPA, utilizing the recent litigation surrounding the Army's proposed action at the Lexington-Bluegrass Depot in Lexington, Kentucky.

Speaker: Captain Brian B. O'Neill, Jr., Assistant to the General Counsel in the Office of the Secretary of the Army.

JA-A-209-9 PROCEDURAL ASPECTS IN ENVIRONMENTAL LITIGATION 33:00

Examples of environmental litigation suits, an exploration of sovereign immunity, and the effect of citizen suit provisions.

Speaker: Captain Thomas M. Strassburg, Administrative and Civil Law Division, TJAGSA.

2. TJAGSA Courses (Active Duty Personnel).

May 10-12: 2d Fiscal Law Course (5F-F12).

May 10-14: 6th Staff Judge Advocate Orientation Course (5F-F52).

May 12-14: 1st Contract Costs Course (5F-F13).

May 17-20: 1st Civil Rights Course (5F-F24).

May 17-21: 3d Management for Military Lawyers (5F-F51).

May 24-28: 13th Federal Labor Relations Course (5F-F22).

June 1-4: 4th Environmental Law Course (5F-F27).

June 7-11: 26th Senior Officer Legal Orientation Course (5F-F22).

June 21-July 2: 1st Military Justice II Course (5F-F31).

June 21-July 2: 1st Military Administrative Law Course (5F-F20).

June 28-July 2: 2d Criminal Trial Advocacy (5F-F32).

July 11-24: USAR School BOAC Phase VI, Procurement Law and International Law, Resident/Nonresident Instruction (5-27-C23). Active duty personnel must obtain approval to attend this course from the Academic Dept. at TJAGSA.

July 12-16: 25th Senior Officer Legal Orientation Course (5F-F1).

July 19-August 6: 15th Military Judge Course (5F-F33).

3. TJAGSA Courses (Reserve Component Personnel).

June 6-19: Reserve Component Training JAGSO Teams.

June 21-July 2: 1st Military Justice II Course (5F-F31).

June 21-July 2: 1st Military Administrative Law Course (5F-F20).

July 11-16: USAR School BOAC Procurement Law Phase VI, Resident/Nonresident Instruction (5-27-C23).

July 11-24: USAR School BOAC Phase VI, Procurement Law and International Law, Resident/Nonresident Instruction and CGSC.

July 19-24: USAR School BOAC International Law Phase VI, Resident/Nonresident Instruction (5-27-C23).

4. Civilian Sponsored CLE Courses.

June

2: FBA, Conference on Collective Bargaining in the Federal Service, Hyatt Regency Chicago, Chicago, IL.

3: FBA, Conference on Openness in Government, Hyatt Regency Chicago, Chicago, IL.

- 3-5: ABA Center for Administrative Justice—Environmental Law Institute, The Impact Statement Process Under NEPA, Shoreham Americana, Washington, D.C.

4-5: ALI-ABA, Practice Under the New Federal Rules of Evidence, Doral Country Club, Miami, FL. Contact: Assistant Director for Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104.

4-5: ALI-ABA, Federal Criminal Practice and Procedure, Doral Country Club, Miami, FL. Contact: Assistant Director for Courses of Study, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St. Philadelphia, PA 19104.

6-11: American Academy of Judicial Education, Graduate Program, Sentencing, University of Colorado, Boulder, CO. Contact: National Conference Coordinator, American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005. Phone: 202-783-5151.

7-9: George Washington University-Federal Publications, The Practice of Equal Employment, Holiday Inn/Golden Gateway, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006 Phone: 202-337-8200.

7-10: American Federation of Information Processing Societies 1976 National Computer Conference, New York, NY. Contact: American Federation of Information Processing Societies, 210 Summit Ave., Montvale, NJ 07645. Phone: 201-391-9810.

7-25: National College of Criminal Defense Lawyers and Public Defenders, Advanced Criminal Defense Practice, Houston, TX. Contact: National College of Criminal Defense Lawyers and Public Defenders, Bates College of Law, University of Houston, Houston, TX 77004. Phone: 713-749-2283.

9-11: University of San Francisco School of Law—Federal Publications, Changes in Government Contracts, Tropicana Hotel, Las Vegas, NV. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

13-18: American Academy of Judicial Education, Appellate Judges Writing Program, University of Colorado, Boulder, CO. Contact: National Conference Coordinator, American Academy of Judicial Education, 539 Woodward Bldg., 1426 H St. NW, Washington, DC 20005. Phone: 202-783-5151.

13-2 July: National College of District Attorneys, Executive Prosecutor Course, University of Houston, Houston, TX. Contact: Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004.

13-9 July: National College of the State Judiciary, Resident Session, University of Nevada, Reno, NV.

13-25: National College of the State Judiciary, Criminal Law/Sentencing, University of Nevada, Reno, NV.

14-15: University of San Francisco School of Law—Federal Publications, Cuneo on Government Contracts, Holiday Inn, Golden Gateway, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

21-23: Federal Publications, Cost Accounting Standards, Washington, DC. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

27-9 July: National College of the State Judiciary, Resident Session, University of Nevada, Reno, NV.

28-30: University of Santa Clara School of Law—Federal Publications, Government Contract Costs, Sheraton/Denver Airport, Denver, CO. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

28-2 July: Northwestern University, 19th Annual Short Course for Defense Lawyers In Criminal Cases, Chicago, IL. Contact: Administrator, Northwestern University School of Law, 357 East Chicago Ave., Chicago, IL 60611. Phone: 312-649-8467.

29-1 July: Legal Education Institute, Management Seminar for Chief Administrative Law Judges, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, US Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483.

July

6-9: LEI, Institute for Legal Clerks, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483.

6-16: National College of District Attorneys, Summer Resident Program, Executive Prosecutor Course, Houston, TX. Contact: Registrar, NCDA, College of Law, University of Houston, Houston, TX 77004.

8-9: Federal Publications, Terminations of Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc, 1775 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

11-16: ALI-ABA, Environmental Litigation, University of Colorado School of Law, Boulder, CO. Contact: Director, ALI-ABA Committee on Continuing Professional Education, 4025 Chestnut St., Philadelphia, PA 19104.

11-18: Association of Trial Lawyers of America, National College of Advocacy, University of Nevada, Reno, NV.

11-23: American Academy of Judicial Education, Trial Judge's Academy, University of Colorado, Boulder, CO. Contact: National Conference Coordinator, Suite 539, Woodward Bldg.,

1426 H St. NW, Washington, DC 20005. Phone: 202-783-5151.

12-16: Federal Publications, Government Construction Contracting, Las Vegas, NV. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

18-23 August: National College of the State Judiciary, Regular Four Week Session, University of Nevada, Reno, NV. Contact: Dean, National College of the State Judiciary, Judiciary College Bldg., University of Nevada, Reno, NV 89507. Phone: 702-784-6747.

18-30: National College of the State Judiciary, New Trends in the Law—The Trial and Public Understanding, University of Nevada, Reno, NV. Contact: Dean, National College of the State Judiciary, Judiciary College Bldg., University of Nevada, Reno, NV 89507. Phone: 702-784-6747.

20-22: LEI, Paralegal Workshop, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483.

25-30: American Academy of Judicial Education, Trial Judge's Writing Program, University of Colorado, Boulder, CO. Contact: National Conference Coordinator, Suite 539, Woodward Bldg., 1426 H St. NW, Washington, DC 20005. Phone: 202-783-5151.

26-30: Federal Publications, Concentrated Course in Government Contracts, Los Angeles, CA. Contact: Seminar Division, Federal Publications Inc, 1725 K St., NW, Washington, DC 20006. Phone: 202-337-8200.

27-29: LEI, Seminar for Attorney-Managers, Washington, DC. Contact: Legal Education Institute, ATTN: Training Operations, BT, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone: 202-254-3483.

29-30: Federal Publications, Terminations of Government Contracts, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc, 1725 K St. NW, Washington, DC 20006. Phone: 202-337-8200.

5. Stenomask Reporter Workshop. The National Stenomask Verbatim Reporters Association (NSVRA) will be holding two workshop-certification seminars for court reporters using stenomask. The workshops will be held at Chaffey College in Ontario, California on 21-23 May and at the Hyatt Regency, Atlanta, Georgia on 11-14 August. Mr. Horace Webb, the inventor of

the Stenomask, will be one of the instructors. NSVRA training was discussed in Summers, CLE Opportunities for Stenomask Reporters, *The Army Lawyer*, Apr. 1976, at _____. Contact: Warren E. Doget, 15099 Sandalwood Lane, Chino, CA 91710 [May NSVRA] or William D. Jackson, Clayton County Courthouse, Jonesboro, GA 30236 [Aug. NSVRA].

International Affairs Section

The chart below is a summary of the quarterly "Report of United States Personnel Confined in Foreign Penal Institutions Pursuant to Sentence of Foreign Courts," (covering the period 1 December 1975-29 February 1976).

NUMBER OF UNITED STATES PERSONNEL IN POST TRIAL CONFINEMENT IN FOREIGN PENAL INSTITUTIONS AS OF 29 FEBRUARY 1976

[illegible]

Labor Relations At Fort Bliss: A Team Concept That Works

By: Captain Edward D. Holmes, Labor Counselor, Fort Bliss, Texas and Robert M. Banks, Jr., Chief, Management-Employee Relations, Fort Bliss, Texas

On 12 July 1974, the Department of the Army initiated a fresh approach to the handling of civilian personnel and labor relations problems. The Judge Advocate General and the Director of Civilian Personnel, Office of the Deputy Chief of Staff for Personnel, established a "Labor Counselor" program in which Judge Advocate General's Corps officers and Department of the Army civilian attorneys were to advise and assist local Civilian Personnel Officers (CPO) and their staffs.¹ This program soon found a regulatory basis in a civilian personnel regulation which provided:

The installation Labor Counselor, a qualified attorney designated by the activity, is available to provide advice and assistance to the civilian personnel officer on matters such as union contacts involving attorneys, third-party proceedings, grievance resolutions, arbitration representation, legal advice to negotiation committees, contract interpretation, management training (including instructor assistance), and review of labor relations policies and procedures.²

The Labor Counselor program has been in operation at the US Army Air Defense Center and Fort Bliss, Fort Bliss, Texas for sixteen months, during which time the Labor Counselors and their civilian personnel "clients" have established an effective working relationship as a labor relations team.³ The following presents the observations of the Chief Labor Counselor and the Chief, Management-Employee Relations, Civilian Personnel Office, at Fort Bliss and will hopefully generate further discussions between Labor Counselors and personnel specialists, at other installations. The CPO is responsible for the conduct of labor relations and the administration of civilian personnel matters.⁴ The Labor Counselor primarily *advises* the CPO and his staff on legal matters and *assists* them in the performance of their duties. It is extremely important, therefore, that attorneys and personnel specialists recognize their respective expertise

and professionalism, but not lose sight of their respective responsibilities.

To establish the proper relationship, the Labor Counselor should first recognize that he can learn much from his "clients." Possession of a law degree and even some past experience in the practice of labor law will not always have direct application to the specialized administration of federal sector labor and civilian personnel law. Since labor relations in the federal service used to be the exclusive domain of career personnel specialists, a Labor Counselor may cause resentment among his "clients" if he presents himself as the instant expert in federal labor law. Similarly, the CPO and his staff should recognize that labor and civilian personnel problems frequently raise legal issues, notwithstanding their day-to-day administration by nonlawyers. Lawyers, by virtue of their professional education and training, tend to analyze problems from a different perspective and employ a different methodology in their solutions. A problem which appears simple to the "layman" personnel specialist may present hidden legal issues to the Labor Counselor. Similarly, an attorney often sees legal problems, real or imagined, which the personnel specialist realizes will not present serious obstacles to the actual execution of the CPO's responsibilities. As one impartial observer noted:

The program hopes to smooth over two points of at least potential friction between the legal and personnel staffs, one attitudinal and the other bureaucratic. The first was the belief among some non-lawyers that attorneys "make trouble" in labor relations with what some call a "See you in court" attitude. The other stemmed from a practice of waiting until a matter got out of hand—that is, escalated into an unfair practice proceeding, arbitration, or other formal adversary proceeding—then calling in lawyers to put the fire out. From the point of view of the

non-lawyer personnel and labor relations staffs, this made them look bad.⁵

This interplay of diverse educational background and specialized training should enable the Labor Counselor and his "clients" to exchange ideas with one another in reaching solutions to their mutual problems.⁶ Initially, a newly appointed Labor Counselor should introduce himself to the CPO and his staff at their place of business. Similarly, the personnel specialist must become acquainted with the Labor Counselor, the Staff Judge Advocate and other attorneys in the installation legal office. A knowledge of working conditions and other personalities involved will increase efficiency and promote understanding. The CPO staff should also realize that the Labor Counselor has other legal and, possibly, military duties as well as his advisory role in labor relations.⁷ While personnel specialists also have numerous personnel administration duties that sometimes take precedence over those matters which seem most important to an attorney, they can devote all their time and energy to the *general* field of labor and civilian personnel matters. In sharp contrast, Army lawyers routinely deal with procurement, criminal law, administrative law, litigation, and other fields unrelated to their Labor Counselor function. The impact of a Labor Counselor's divided attention can be alleviated somewhat by appointment of an Assistant Labor Counselor who assists the Chief Labor Counselor and provides continuity when his senior is ill, reassigned or otherwise unavailable.

Once rapport between the Labor Counselor and the civilian personnel staff has been established, seven principal areas of cooperation may be identified where the parties should concentrate their efforts. The first area of cooperation revolves around the drafting of any documents or other writings that may have some possible legal effect. The most obvious instance, of course, is the collective bargaining agreement and the various management proposals and counterproposals that may become part of that agreement. A related matter of particular importance is the drafting of proposed ground rules containing the suggested procedures for negotiation of that agreement. Other documents include the notice

of proposed action and the decision letter in disciplinary and adverse action cases, the letter charging or denying an unfair labor practice, any written statement of the management position in proceedings before the Department of Labor or the US Civil Service Commission, the decision notice in employee grievances, and the issues to be submitted to an arbitrator. Briefs for administrative hearings have obvious legal implications, and routine letters to attorneys, employees and union officials can come back to "haunt" management if not carefully drafted.

Since the Civilian Personnel Officer is charged with the actual administration of Labor Relations, he and his staff should, in most instances, draft all written documents and correspondence. If the Labor Counselor were to do this initially he would usurp the CPO's role. Ideally, the Labor Counselor should review for legal sufficiency the many documents prepared by the CPO and his staff. Since a total review is often impractical, the Labor Counselor and the personnel specialists should mutually agree on a standard procedure by which specified types of documents will be given a legal review.

A second area of coordination should be the investigation of incidents or situations that could possibly result in third-party hearings. Because lawyers are trained in the law of evidence and usually have more experience in preparing cases for trial or hearing, they can be especially helpful in the formative stages of a possible disciplinary action or in preparing a defense to an unfair labor practice charge. Some personnel specialists are unaware that a case is only as strong as the degree to which management can convince an arbitrator, hearing examiner, or Administrative Law Judge of its merits. The personnel specialists handling a particular action should therefore brief the Labor Counselor on all available facts. The Labor Counselor should then suggest other areas of investigation, pose questions that might arise at a subsequent hearing and attempt to develop the issues to support his theory of the case. A Labor Counselor can be particularly helpful in supervising the taking of statements and preserving existing evidence for future use. Frequently the parties to an incident unintentionally twist the facts to suit their own version

of what happened. A skillful and detailed investigation will usually reveal interpretive inaccuracies. Extreme care should be exercised, however, in conducting interviews of witnesses to avoid allegations of interference with basic employee rights and resulting unfair labor practices. Each event that could possibly lead to a third party hearing should, therefore, be jointly investigated by the "labor relations team."

A third area of cooperation is in the conduct of negotiations with labor unions. In addition to drafting proposals and contract terms, and planning negotiation tactics, the Labor Counselor may join in the actual negotiations. One observer has noted,

Whether the labor counselors will also serve as members of management negotiation teams is a matter to be determined on a case-by-case basis. It appears that in most instances agreement on the substance of clauses will be on the province of non-lawyer negotiators for both sides, with the counselors coming in after substantive agreement is reached to help draft the actual contract language.⁸

At some installations, such as Fort Bliss, the Labor Counselor is appointed a member of the activity negotiating team, and actually participates in the negotiation process. The manner and extent of his participation, however, should be carefully considered by the Commander, the Civilian Personnel Officer, and the Staff Judge Advocate. The attorney should not be the chief spokesman of the negotiating team because other members, especially the line managers, are more familiar with conditions in the bargaining unit and must ultimately live with the agreement. In addition, if negotiations raise an issue having legal ramifications, such as the negotiability of a particular proposal, the Labor Counselor's opinion will usually seem more authoritative and impartial if he has not previously engaged in "verbal combat" with the union spokesman or taken a partisan or overly "legalistic" position. The presence of a union lawyer in negotiations makes the participation of the Labor Counselor a necessity. The union will undoubtedly use its lawyer-negotiator to its best advantage. The presence and participation of the Labor Counselor will

tend to neutralize the union attorney's effect and will bolster the morale and persuasiveness of the management team. Before the Labor Counselor participates in actual negotiations, however, he should obtain some practical training in negotiation skills and techniques by attending special training seminars, short courses at The Judge Advocate Generals School, and possibly even watching actual negotiations as a non-participating observer.

Once agreement is reached on all proposals and counterproposals, the union and management negotiation teams will usually want to finalize the agreement by polishing the language of initialed items, reorganizing the form of the contract, and editing conflicting or unnecessary terms. The ground rules for this process should have been drafted and negotiated with the participation of the Labor Counselor and personnel specialists. If the parties to the negotiations are unable to reach agreement the Labor Counselor and the personnel specialist should jointly draft proposals or counterproposals that are acceptable to the management and union teams. Frequently, the opposing teams are relatively close to agreement, but simply cannot find the proper words to express their understanding. The actual presence of the attorney at the bargaining table may facilitate agreement in this situation.

A fourth area in which attorneys and civilian personnel specialists may profitably coordinate their efforts is in legal research. While lawyers may enjoy a high degree of expertise in this area, their non-lawyer clients in the Civilian Personnel Office have daily working knowledge of the Federal Personnel Manual, Civilian Personnel Regulations, Comptroller General opinions, and decisions of the federal sector program authorities. Long before the Labor Counselor program came into existence, the CPO and his staff were required to interpret and administer the various sources of administrative and labor law. Attorneys are frequently less familiar with federal labor and civilian personnel law than with private sector labor law and other traditional areas of legal education and military law practice.⁹ The Labor Counselor should not, therefore, hesitate to discuss legal concepts with the non-lawyer he advises. In doing so, he will expand his own legal

and regulatory knowledge, and will contribute his lawyer's insight to his clients' understanding of the law. Moreover, the civilian personnel specialists are usually untrained in other areas of the law and welcome suggestions and interpretations beyond their expertise. This independent relation is often reflected in the frequent need of the Labor Counselor and the Civilian Personnel Officer to share one another's research materials.

The fifth and most dramatic area of interaction between attorneys and personnel specialists is in the preparation for and representation of the command in "third-party" proceedings. While Civilian Personnel Regulations provide only that Labor Counselors will give "advise and assistance" in this area.¹⁰ The Judge Advocate General and the Director of Civilian Personnel have indicated that Labor Counselors will *represent* the command in third-party hearings, particularly those before the Department of Labor or US Civil Service Commission.¹¹ Presumably, this mandate also extends to hearings before arbitrators and the US Army Civilian Appellate Review Office. Some installation commanders insist that they be represented by qualified Army lawyers before all third-party hearings.¹² The legal expertise of attorneys, however, does not justify a solo performance by the Labor Counselor at the negotiation table. Invariably one or more civilian personnel specialists will have greater familiarity with the subject matter of a particular hearing. In particular, civilian personnel specialists may be able to suggest witnesses and locate documentary evidence.

The Labor Counselor should note that those personnel specialists who participated in the initial investigation processing, or other administration of the problem may not be aware of any procedural or judgmental error on their part. Thus, the "management representative" should play the "devil's advocate" with his personnel advisor in order to isolate and discover any weakness in the management position. Before entering the hearing, the Labor Counselor-representative should gain approval from the hearing officer for a personnel specialist to attend the hearing as a "technical advisor." Utilization of the "labor relations team" at third-

party hearings will assure the most efficient and effective representation of the activity.

A sixth aspect of the Labor Counselor program is the joint training of supervisors in labor relations and procedures. A well negotiated labor agreement is worthless if management supervisors cannot administer it properly and avoid repeated commission of unfair labor practices or the continual filing of grievances. Similarly, ill planned disciplinary actions which are doomed to failure for procedural errors or lack of substantial merit undermine effective management. To avoid such pitfalls, Labor Counselors should assist the CPO and his staff in instructing management officials on their duties and responsibilities. Explanation by the Labor Counselor of management's position will often add credibility to the presentation of a non-lawyer, particularly if supervisors are personally dissatisfied with the Civilian Personnel Office. Military supervisors are sometimes unconvinced by and suspicious of civilian instructors. Since most Labor Counselors are uniformed military lawyers, their participation in the instruction and training process helps to insure the respect of military supervisors for the civilian personnel system.

The final area of coordination, the planning of labor relations policies and procedures, is perhaps the most significant responsibility of both elements of the Labor Counselor-CPO. Long range projects and proposed personnel actions should be staffed through the Labor Counselor for his comments and suggestions. While the final responsibility lies with the CPO, reliance on the labor relations team concept will provide added depth to the decision-making process.

If any lesson can be learned from the first year of the Labor Counselor program at Fort Bliss, it is simply that labor relations and civilian personnel administration are too complex to be handled by either lawyers or personnel specialists individually. Only a labor relations "team" consisting of professionals who compliment one another's varied skills and experience can handle the growing challenges presented by increased employee organization and expanded union activity.¹³

Footnotes

1. Letter from MG Harold E. Parker, Acting The Judge Advocate General, to Staff Judge Advocates, subject: The Army Lawyer as Counselor to the Civilian Personnel Officer, dated 15 July 1974 (hereinafter cited as Letter from MG Parker); Letter from Ben B. Beeson, Director of Civilian Personnel, to Civilian Personnel Officers, subject: Relationships Between Civilian Personnel Officers and Judge Advocate Staffs (Labor Relations Bulletin No. 80), dated 12 July 1974 (hereinafter cited as Letter from Ben B. Beeson. The Labor Counselor program was "fresh" only insofar as the Army was concerned. The Air Force had initiated a similar program a year earlier. See JAG Labor Law Letter 73-1 (17 July 1973).
2. Civilian Personnel Regulation 700 (Ch 21), Personnel Relations and Services, Chapter 711.A, Labor Relations, 18 March 1975, paragraph 1-5c (Hereinafter cited as CPR 700 (Ch 21) 711.A). Labor Counselors also "advise and assist" other staff officers, E.G., the Equal Employment Opportunity Officer, Human Relations Officer, the Inspector General, and high level managers and supervisors of civilian personnel.
3. The term "labor relations team" was apparently first used by Acting The Judge Advocate General MG Harold E. Parker. See Letter from MG Parker, note 1 *supra*.
4. CPR 700 (Ch 21) 711.A, paragraph 1-5b. Ideally, the CPO should have organizational status equal to that of the Staff Judge Advocate and report directly to the installation Commander. If the CPO is merely a subdivision of a larger personnel directorate or staff organization and does not report directly to the Commander, coordination with the Command Group is more difficult and the "labor relations team" may be handicapped. At Fort Bliss, the CPO reports directly to the Deputy Commander.
5. 593 Government Employee Relations Reporter A-8 (1975) (hereinafter cited as GERR).
6. Labor Counselors and personnel specialists should pursue joint educational opportunities whenever possible. Army Lawyers should attend courses presented by the Office of the Deputy Chief of Staff for Personnel and the US Civil Service Commission, while civilian personnel specialists should attend courses at The Judge Advocate General's School of the Army (TJAGSA) whenever practical. See Letter from MG Parker, Appendix, *JAGC LABOR COUNSELOR PROGRAM*.
7. See Letter from MG Parker.
8. 593 GERR A-8 (1975).
9. Newly appointed labor counselors may not have yet attended the Labor Relations Courses at TJAGSA. Law school courses in labor law typically emphasize the law and practice of the private sector. Civil Service laws and regulations are almost totally ignored.
10. CPR 700 (Ch 21) 711.A.
11. See Letter from MG Parker, Appendix, *JAGC LABOR COUNSELOR PROGRAM* and Letter from Ben B. Beeson.
12. Labor Counselors are supposed to have at least one year of field experience prior to assignment as Labor Counselor. See Letter from MG Parker, Appendix, *JAGC LABOR COUNSELOR PROGRAM*. Experience in the trial of courts-martial is invaluable in the participation before administrative hearings, notwithstanding their relatively informal nature.
13. The likelihood of legislation giving a statutory basis to labor relations in the federal sector will only increase the need for greater cooperative efforts.

Legal Assistance Items

*By: Captain Mack Borgen and Captain Stephan Todd,
Administrative and Civil Law Division, TJAGSA*

1. ITEMS OF INTEREST.

Family Law — Support — Garnishment of Federal Monies — Judicial Interpretation. Section 659 of title 42 of the United States Code, which has been in effect for nearly one year, provides for the garnishment of federal wages "in order to provide child support or make alimony payments." The following recent cases interpreting the statute clearly establish, *inter alia*, that jurisdiction for the enforcement of child support and alimony obligations continues to lie in state courts. Most courts have held that § 659 is merely a waiver of sovereign immunity and

is not intended to establish an independent basis of federal court jurisdiction. *American Oil Co. v. Starks*, ___ F.2d ___ (7th Cir. 1975), 44 U.S.L.W. 2323, held that the doctrine of sovereign immunity does not immunize U.S. Postal Service employees from garnishment procedures to effect state court judgments. In *West v. West*, 402 F. Supp. 1189 (N.D. Ga. 1975), former wives of federal employees brought garnishment actions to enforce child support and alimony obligations. The action was initiated in state court, the United States, as garnishee, removed the case to federal court. The court held that removal to federal court is without basis under 28 U.S.C. §

1442(a). "[T]hese actions do not purport to subject any federal officer to a personal liability or penalty, [and thus] they are not actions 'against' a federal officer within the purview of § 1442(a) (1)." 402 F. Supp. at 1191. The court also held that there is no basis for removal under §§ 1141(a) and 1346(a) (2). Such actions are not "claims" against the United States. *Accord, Morrison v. United States Dep't of the Air Force*, — F. Supp. — (N.D. Tex. 1976), 2 Family L. Rep. 2312. "Section 659 was passed by Congress in order to do away with the barrier of sovereign immunity in suits to garnish payments due to federal employees." But "[s]ection 659 in no way purports to establish a federal right to garnishment." Consequently, "there is no statutory jurisdictional base by which the federal courts can assert jurisdiction over such actions." Two other cases in this area are *Bowling v. Howland*, 398 F. Supp. 1313 (M.D. Tenn. 1975), and *Carroll v. Carroll*, — F. Supp. —, No. P-Misc. 75-63 (N.D. Fla. 1975). In *Willhite v. Willhite*, 546 P.2d 612 (1976), the couple was divorced in Texas with child support provisions incorporated in the decree. The ex-husband now resides in Oklahoma and is employed by the Federal Aviation Administration. The former wife obtained a Texas judgment for arrearages and then filed the judgment in Oklahoma under the Uniform Enforcement of Foreign Judgments Act [URESA was not discussed]. Garnishment was permitted under 42 U.S.C.A. § 659 to the extent of 25% of the employee's wages in accordance with Oklahoma law. Further, attorney's fees were not awarded to the former wife since under Oklahoma law attorney's fees are allowed only in divorce and separate maintenance actions, but are not allowed in attachment and garnishment proceedings. [Ref: Chs. 20, 26, DA Pam 27-12.]

2. RECENTLY ENACTED LEGISLATION.

Consumer Affairs — Credit Discrimination. The Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691-1691b (1976), prohibited discrimination on the basis of sex or marital status in credit transactions. Recently, in the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239 (23 March 1976), Congress has extended the prohibition to encompass credit discrimination:

a. On the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract);

b. Because all or part of the applicant's income derives from any public assistance program; or

c. Because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

In addition, the amendments require the creditor to notify a credit applicant of the action on the application within 30 days of the creditor's receipt of the completed application, unless the Federal Reserve Board establishes a longer time period. If the creditor takes "adverse action", as defined by the statute, on the credit application, the reasons for such adverse action must be conveyed to the applicant. The above amendments become effective on 23 March 1977. Other amendments cover, *inter alia*, the recovery of damages for violations of the Act, including a requirement that the plaintiff must elect whether to seek to recover monetary damages under either federal law or state law. These other amendments become effective on the date of enactment. [Cross-reference: *Legal Assistance Items*, THE ARMY LAWYER, Jan. 1976, at 36.] [Ref: Ch. 10, DA Pam 27-12.]

Consumer Affairs — Consumer Leasing. In recognition of the recent trend toward the increased leasing of automobiles and other durable goods for consumer use, Congress enacted the Consumer Leasing Act of 1976, Pub. L. No. 94-240 (23 March 1976). This Act, an amendment to the Truth-in-Lending Act, incorporates full disclosure requirements into consumer leasing advertising and transactions. A consumer lease is defined as: "[A] contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months, and for a total contractual obligation not exceeding \$25,000, primarily for personal, family, or household purposes. . . ." A transaction will still be considered to be a consumer lease even though the lessee has an option to purchase or otherwise become the owner of the property at the expiration of the lease. However, credit sales are excluded from the definition of a consumer lease, in addition to leases for agricultural, busi-

ness, or commercial purposes. The Act becomes effective on 23 March 1977. [Ref: Ch. 10, DA Pam 27-12.]

3. ARTICLES AND PUBLICATIONS OF INTEREST.

Consumer Affairs — Consumer Protection. "Guide to Federal Consumer Services," published by the Office of Consumer Affairs, Department of Health, Education, and Welfare [DHEW Pub. No. (OS) 76-512], is a compilation of the consumer assistance programs and services of the various federal agencies. Single copies may be obtained, free of charge, by writing: Guide, Consumer Information, Pueblo, Colorado 81009. Bulk copies (10 or more) may be obtained, free of charge, from: Office of Consumer Affairs, Consumer News, HEW, North Building, Washington, D.C. 20201. [Ref: Ch. 10, DA Pam 27-12.]

Consumer Affairs — Consumer Protection. DoD Information Guidance Series (DIGS) No. 8E-9, "Aid from Federal Agencies," March 1976, is a listing of offices within federal agencies which consumers may contact to seek information concerning specific areas of interest to consumers. [Ref: Ch. 10, DA Pam 27-12.]

Consumer Affairs — Warranties. Note, *The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act: Protecting Consumers Through Product Warranties*, 23 WASH. & LEE L. REV. 163 (1976). [Ref: Ch. 10, DA Pam 27-12.]

Decedent's Estates and Survivor Benefits — Estate Planning — Insurance. Lacy, *Life Insurance As a Function of Estate Planning For The Middle-Income Military Member*, 17 AIR FORCE L. REV. 1 (Winter 1975). [Ref: Chs. 11, 13, DA Pam 27-12.]

Family Law — Adoption — Vietnamese Children. Note, *International Adoption: United States Adoption of Vietnamese Children: Vital Considerations For the Courts*, 52 DENVER L.J. 771 (1975). [Ref: Ch. 21, DA Pam 27-12.]

Family Law — Divorce. The April 1976 issue of TRIAL MAGAZINE contains several articles of particular interest to the family law attorney. Freed, Foster, *Taking Out the Fault But Not the Sting*, summarizes the present state of American law of divorce and details changes in the grounds for divorce, the elimination of traditional defenses, the changing concepts in property distribution, alimony, and child support and custody. Maxwell, *Divorce Without Trauma*, contains criticism of the "nonchalant attitude toward marriage and divorce" and suggests that the attorney's proper role in a divorce proceeding and in certain of the attorney's pretrial counseling responsibilities be evaluated. Kram, Frank, *The Future of "Tender Years"*, is a brief examination of the origin, history, and present viability of the "tender years" doctrine of child custody. Galvin, *The Runaway Parents*, contains analysis of the background and major provisions of the Social Services Amendments of 1974. Thayer, *A Stitch in Time* is a proposal for the application of "preventive legal care" in order to avoid post-marital legal problems. [Ref: Part 9, DA Pam 27-12.]

Family Law — Divorce — Division of Military Retired Pay. *The Supreme Court of California 1974-1975 — Community Property*, 64 CAL. L. REV. 239, 305-328 (1976) [Community Property Status of Military Benefits.] [Cross-reference: *Legal Assistance Items*, THE ARMY LAWYER, July 1975 at 35-36; Dec. 1975 at 35.] [Ref: Ch. 37, DA Pam 27-12.]

Family Law — Divorce and Separation — Tax Considerations. Sander, Gutman, *Tax Considerations in Divorce and Separation: Child Support and Dependency Exemptions*, 1 FAMILY L. REP. 4009 (Monograph No. 13, 1975); *Tax Considerations. . . : Alimony and Separate Maintenance — Part 1*, 2 FAMILY L. REP. 4021 (Monograph No. 15, 1976); *Tax Considerations. . . : Alimony and Separate Maintenance — Part 2*, 2 FAMILY L. REP. 4025 (Monograph No. 16, 1976); *Tax Considerations. . . : Property Transfers and Attorneys Fees*, 2 FAMILY L. REP. 4031 (Monograph No. 17, 1976). [Cross-reference: *Legal Assistance Items*, THE ARMY LAWYER, Mar. 1976 at 17.] [Ref: Ch. 15, DA Pam 27-12.]

Family Law — Remedies For Nonsupport — Texas. Note, *Delinquent Child Support: Remedies, Limitations and Laches*, 28 BAYLOR L. REV. 197 (1976). [Ref: Ch. 26, DA Pam 27-12.]

Veterans Benefits. Gillan, *Legal Issues in Veterans Benefit Legislation: Programs For the*

Elderly, 9 CLEARINGHOUSE REV. 839 (1976). [Ref: Ch. 44, DA Pam 27-12.]

Veterans Benefits. DD Information Guidance Series (DIGS) No. 8B-7, "Veterans Benefits Timetable," April 1976. [Ref: Ch. 44, DA Pam 27-12.]

Enlisted Administrative Separations

Major Change Effective 1 April 1976

By: Administrative & Civil Law Division, TJAGSA

Utilizing DA MSG DAPC-EPA-A 302228Z MAR 76, Subject: Interim Changes to AR 635-200 and AR 635-206, MILPERCEN has implemented most of the provisions of the new DoD Dir 1332.14 (30 Sep 75) Enlisted Administrative Separations, and made other significant changes in the subject regulations. The new Directive and changes update and supersede the old directive of the same number and become effective on 1 April 1976. Most of the key areas offering judge advocates are outlined below.

1. General

a. Discharge for Parenthood. Paragraph 5-40 has been added to AR 635-200 to allow discharge for parenthood. This new paragraph fills the void left by the rescission of Section IV, Chapter 8, AR 635-200 last year by DA MSG DAPC-PAS-S 061400Z JUN 75 Subject: Interim Change to Chapters 6 and 8, AR 635-200 and the Trainee Discharge Program.

b. Minority Membership on Discharge Boards. Change has been made to Chapters 13 and 14, AR 635-200, and to AR 635-206 to require minority membership on boards considering minority servicemembers for discharge where the servicemember makes a specific request for such membership in writing. In such cases, at least one voting member of the board will be a member of a minority group if available. In addition to the presence of a minority member *per se*, such member should (if available) be of the same minority group as the servicemember being considered for discharge. A definition of "minority group" has been added to paragraph 1-3k, AR

635-200 and the scope includes, but is not limited to "Negroes, American Indians, Mexican Americans, Puerto Ricans, Eskimos, Aleuts, Asian Americans, and Spanish-surnamed Americans."

c. Civilian Witnesses. While authorized under the Joint Travel Regulations, the presence of civilian witnesses at government expense at discharge proceedings had been precluded by the old DoD Directive 1332.14. The new directive has removed this preclusion and the implementing message allows for the issuance of invitational travel orders in cases where "the president of the board determines the testimony of the witness is substantial, material, and necessary . . . and that an affidavit" will be insufficient. This provision is implemented as paragraphs 13-22b(3) and 14-14, AR 635-200, and paragraph 10b, AR 635-206.

2. Discharge for the Good of the Service — Chapter 10, AR 635-200. The scope of eligibility for submission of requests for discharge for the good of the service has been significantly narrowed and is now limited to offenses which include a Bad Conduct Discharge or Dishonorable Discharge under Section A of the Table of Maximum Punishments (MCM 1969, Rev.). Therefore, the member facing a punitive discharge due to Section B of the Table, (*e.g.*, prior convictions, or the presence of charges for two or more offenses authorizing total confinement of six months or more, etc.) may no longer be discharged under chapter 10. This change is not merely a statement that discharge in Section B situations is inadvisable, but rather, an outright preclusion of the use of Chapter 10 in such cases.

3. Separation for Misconduct or Unsuitability — Chapter 13, AR 635-200.

a. Misconduct. To avoid possible confusion with the area of "medical unfitness" the term "Unfitness" has been removed from Chapter 13, AR 635-200. The term "misconduct" has been substituted in its place to cover all the grounds for separation presently listed in paragraph 13-5a except paragraph 13-5a(3) (b) [exempt drug abuse]. This latter provision has been moved to the new Chapter 16 which is discussed below. The terms "unfitness" and "unfit" will no longer be used in connection with any portion of an action under Chapter 13.

b. Unsuitability.

1) The term "Character and behavior disorders" under paragraph 13-5b(2) has been changed to "Personality Disorders."

2) While alcoholism has been retained in the category of Unsuitability, any cases falling within the Drug and Alcohol Abuse Program are to be treated in accordance with the new Chapter 16.

4. Separation for Fraudulent Entry — Chapter 14, AR 635-200. The subject of recruiter malpractice or connivance has been of significant interest to both the criminal and administrative law fields during the past year (*U.S. v. Russo*, 23 U.S.C.M.A. 511, 50 C.M.R. 650, 75-7 JALS 1 (1975); *U.S. v. Barrett*, 23 U.S.C.M.A. 474, 50 C.M.R. 493, 75-7 JALS 12 (1975)). While not stemming from a new DoD Directive, this issue has been directly confronted in the message change to 635-200.

a. In any criminal action for fraudulent entry in which "recruiter connivance" appears to be involved, disposition will be in accordance with paragraph 5-12, AR 635-200 regarding lack of jurisdiction. (See DA MSG DAPC-PAS-S 071400Z FEB 75 Subject: Interim Change to AR 635-200 Paragraphs 5-32 and 5-12).

b. In all situations involving fraudulent entry, general court-martial convening authorities are directed to inquire into the possible presence of recruiter connivance. Where such impropriety is verified, the enlistment will be voided. If in the

course of the inquiry the servicemember (after being advised of his rights pursuant to Article 31, UCMJ) indicates there was recruiter connivance, or refuses to answer questions on the subject, the enlistment will be immediately voided. Further, even where a determination of retention has been made, inquiries to recruiting officials are required and if such inquiries reveal recruiter connivance the enlistment will be voided despite the initial determination to retain.

5. Personal Abuse of Alcohol and Other Drugs — Chapter 16, AR 635-200. Following the mandate set forth in *U.S. v. Ruiz*, 23 U.S.C.M.A. 181, 48 C.M.R. 797 (1974), the new DoD Directive and message change have removed exempt drug abuse from the category of misconduct and placed it, along with exempt alcohol abuse, as a separate grounds for discharge in the new Chapter 16, AR 635-200. The general policies of this chapter have been in operation for some time under the Drug and Alcohol Abuse Program set forth in DA Cir 600-85 (Jun 72). Under the new procedures of Chapter 16, individuals falling within the exemption program and failing of rehabilitation will be discharged with *Honorable Discharges only*, not merely with discharges under honorable conditions. There is no right or requirement for a board of officers to hear cases under this chapter, and authority is given to special court-martial convening authorities to take final action to discharge. Individuals being considered for discharge under this chapter do have the right to consult with consulting counsel (JAGC officer pursuant to paragraph 1-3c, AR 635-200) and to submit any statements desired to the discharge authority. It should be noted that the presence of Chapter 16 does not remove the misconduct category of drug abuse from paragraph 13-5a(3) (a), AR 635-200. Personnel may be discharged for non-exempt drug abuse under this paragraph and face a possible Undesirable Discharge.

As indicated above, the changes discussed went into effect 1 April 1976. In accordance with paragraph 13 of the message change, discharge proceedings initiated prior to 1 April 1976 will be processed "according to regulations and subsequent changes in effect at the time of initia-

tion." While the above changes are considered fairly significant, judge advocates should be aware of the pending total revision of AR 635-

200 which will incorporate the new changes discussed and make other significant changes in the processing of administrative separations.

Current Materials of Interest

Articles

Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975). By Colonel Darrell L. Peck, JAGC, U.S. Army.

Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83 (1975) By Major Clarence I. Meeks III, Judge Advocate, U.S. Marine Corps.

Ford, *Officer Selection Boards and Due Process of Law*, 70 MIL. L. REV. 137 (1975). By Captain John N. Ford, USAR.

Leibowitz, *The Applicability of Federal Law to Guam*, 16 VA. J. INT'L L. 21 (1975).

Sherrer & Eft, *Consolidated Pretrial Procedures in Environmental Litigation*, 8 NATURAL RESOURCES LAWYER 631.

Note, *Military Due Process and Selection of Court-Martial Panels: An Illogical Gap in Fundamental Protection*, 2 HASTINGS CON. L. Q. 547-570 (1975).

McPeak, *Israel: Borders and Security*, 54 FOREIGN AFFAIRS 426 (1976). Colonel Merrill A. McPeak, USAF, is currently Military Fellow, Council on Foreign Relations.

Schlesinger, *Secretary of Defense James R. Schlesinger's Remarks to the Men and Women of the Department of Defense at a Farewell Ceremony Held at the Pentagon on 10 November 1975*, NAVAL WAR COLLEGE REV., Fall 1975, at 57.

Book

LILICH, *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW*, Volume III. By Richard B. Lillich. Contact: University Press of Virginia, Box 3608, University Station, Charlottesville, VA 22903.

Book Reviews

Manning, *Judging The Judges: The Cause, Control And Cure of Judicial Jaundice*, By David Stein, 6 CUMBERLAND L. REV. 755 (1976). Colonel R. Kenneth Manning, Jr., is currently on the Law Faculty at the Samford University Cumberland School of Law, Birmingham, AL 35209.

Paust, *Aerial Hijacking as an International Crime*, By Nancy D. Joyner, 16 VA. J. INT'L L. 229 (1975).

Interim change to Chapter 16, AR 27-10. Effective 22 March 76 AR 27-10, 26 November 1968 is changed as follows:

Paragraph 16-5A, as found in reference A, is changed to read as follows:

A. The military magistrate will review all documents and personally interview each person in pretrial confinement within 7 days after that person has entered pretrial confinement. The authority initially ordering the prisoner into pretrial confinement will immediately provide a complete checklist for confinement (Figure 16-1) to the military magistrate. The checklist will be reproduced locally as illustrated in Figure 16-1. The authority ordering confinement will also provide the magistrate with the information which formed the basis for his decision to impose confinement. The military magistrate initially will determine whether there is probable cause to believe the accused committed an offense under the Uniform Code of Military Justice and, if satisfied probable cause exists, whether the accused should remain in pretrial confinement to assure his presence at trial. In making the probable cause determination the military magistrate must determine whether the facts and circumstances before him are sufficient to warrant a prudent person in believing that the person confined committed an offense. The determination

as to whether pretrial confinement is necessary to assure the accused's presence at trial will be made within the sound discretion of the magistrate. Examples of appropriate factors to be considered in making the latter determination include the seriousness of the offense, the character of the accused's prior service, and any attempts by him to frustrate trial. If the military magistrate determines, on the basis of his re-

view, that probable cause exists and that continued pretrial confinement is necessary to assure the accused's presence at trial, he will so record that fact and no further action will be required. He will review each case at least every two weeks.

The above interim change will be included in a subsequent printed change to AR 27-10.

JAGC Personnel Section

From: PP&TO, OTJAG

Sony Court Reporting System. Judge Advocate offices in the field have reported mechanical difficulties with the new Sony court-reporting system. Analysis of the control unit of the system by the U.S. Army Electronics Command revealed several workmanship defects which caused malfunctioning. To correct these deficiencies, control units in the field will be re-

called, replaced and/or repaired as new control units become available from the supplier. To facilitate reporting of any future problems, a telephone point of contact has been established at the U.S. Army Electronics Command, Television-Audio Support Activity, Sacramento Army Depot, Sacramento, California (Autovon 839-3205).

By Order of the Secretary of the Army:

Official:

PAUL T. SMITH

*Major General, United States Army
The Adjutant General*

FRED WEYAND

*General, United States Army
Chief of Staff*

